IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9763 of 2001
WITH
SPECIAL CIVIL APPLICATION No 9766 of 2001
WITH
SPECIAL CIVIL APPLICATION No 9767 of 2001
WITH
SPECIAL CIVIL APPLICATION No 9768 of 2001
WITH
SPECIAL CIVIL APPLICATION No 9770 of 2001
WITH
SPECIAL CIVIL APPLICATION No 9773 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL Sd/-
and
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SURAT CITY GYMKHANA

Versus

DEPUTY COMMISSIONER OF INCOME TAX

Appearance:

MR S.N SOPARKAR AND MR K.H.KAJI for Petitioner No. 1
MR MIHIR JOSHI FOR MR MANISH R BHATT for Respondent No. 1
NOTICE SERVED BY DS for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE D.A.MEHTA

Date of decision:25/01/2002

COMMON CAV.JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

1 The petitioner and the respondent in this batch of petitions are common, so are the facts and submissions, and hence all these petitions were taken up for hearing and final disposal together at the admission stage.

2 The petitioner is a charitable trust. It has been registered under the Bombay Public Trust Act,1950 vide certificate of registration dated 24/2/1983. On the same day the petitioner trust has also been registered as a Society under the Societies Registration Act,1860. The petitioner applied to the Commissioner of Income Tax for being registered under Section 12A of the Income Tax Act,1961 (hereinafter referred to as 'the Act'), and has been accordingly registered on 24/2/1983. It is further relevant to note that the petitioner Trust was also granted certificate under Section 80G of the Act by C.I.T.,Surat on 22/12/1986 for the first time and thereafter the recognition under Section 80G of the Act has been renewed from time to time.

3 The petitioner Trust was assessed since assessment year 1984-85 and its claim of exemption under Section 11 of the Act was duly granted for assessment years 1984-85 to 1987-88. Similarly for assessment years 1988-89 to 1990-91, the Assessing Officer once again granted exemption under Section 11 of the Act. However, for assessment years 1991-92 and 1992-93, the assessment orders under Section 143(3) of the Act were passed on 11/11/1992 and 10/2/1995 respectively denying the claim of exemption under Section 11 of the Act. It appears that the Assessing Officer initiated proceedings under Section 147 of the Act for assessment years 1988-89, 1989-90 and 1990-91 and in the reassessment the claim of exemption under Section 11 was rejected. Therefore, the petitioner Trust went in appeal for all the five assessment years before C.I.T.(Appeals), but as it failed, Second Appeals were preferred before the Tribunal.

4 The Tribunal vide its order dated 20/1/2000 allowed the appeals by recording the following findings :

[i] The reassessments for assessment years 1988-89 to 1990-1991 were quashed as no reasons were recorded and even on merits, in absence of any fresh facts or material, the reassessments were held to be illegal and without jurisdiction.

[ii] For all the five years it was held that the petitioner Trust was a charitable institution under Section 11(1) of the Act and was entitled to exemption under Section 11 of the Act.

The operative portion of the Tribunal's order read thus :

"For the reasons discussed above and particularly keeping in view the various judicial pronouncements on the issue considered by us as above, we hold that the assessee trust is entitled to the claim of exemption u/s.11 of the Act. We would accordingly hold that the assessee trust is a charitable institution under section 11(1) of the I.T.Act and would be entitled to exemption u/s. 11 if other conditions regarding application and utilization of income as per the provisions of section 11 to 13 are satisfied in the instant case. With these observations the appeals of the assessee for AYS 1988-89 to 1990-91 are allowed and for AYS 1990-91 and 1991-92 the appeals are disposed of protanto as above".

5 At this stage we may note that the Tribunal's order quashing the reassessment proceedings for assessment years 1988-89 to 1990-91 was accepted by the respondent-revenue but tax appeals being Tax Appeals No. 80 and 81 of 2000 were preferred for assessment years 1991-92 and 1992-93. The said Tax Appeals have been dismissed by this Court after hearing both the sides by its order dated 25/9/2000.

6 It is in this backdrop of factual events that these petitions have been filed challenging the validity of notice issued under Section 148 of the Act dated 9/1/2001 for each of the assessment year under consideration. The relevant facts for each of the assessment year are briefly recapitulated hereunder.

ASSESSMENT YEAR 1990-1991.

7 On 27/11/1992, notice under Section 148 of the Act was issued and in pursuance thereto assessment order was passed on 10/2/1995 under Section 143(3) read with Section 147 of the Act whereby the petitioner's claim for exemption under Section 11 was denied. On 22/9/1995 the C.I.T.(Appeals) dismissed the appeal and the Second Appeal was decided by the Tribunal on 20/1/2000. The notice under Section 148 of the Act has been issued on 9/1/2001. The petitioner called upon the respondent to supply reasons recorded under Section 148(2) of the Act and the said reasons were supplied in August,2001. The present petitions were filed on 20/9/2001 and the same were circulated for hearing on 19/10/2001 but were taken up for hearing on 22/10/2001.

7.1. It appears that the petitioner furnished return of income on 20/7/2001 in response to notice under Section 148 of the Act. The respondent issued a questionnaire letter dated 3/9/2001 fixing the hearing on 17/9/2001. The petitioner asked for time to comply with the questionnaire letter and the respondent by his letter dated 10/10/2001 fixed the next date of hearing on 19/10/2001. As the petitioner asked for time once again the respondent informed that the case was adjourned to 23/10/2001 for the last and final time. On 22/10/2001 the petitioner once again asked for time and pointed out to the respondent that the assessment was getting barred by limitation only on 31/3/2002 and the respondent could at least keep the assessment proceedings pending till end of November,2001. However, as the request was rejected by the respondent on 23/10/2001 the Chartered Accountant of the petitioner appeared in person and submitted a detailed letter dated 23/10/2001. It appears that another letter dated 23/10/2001 was also submitted by the petitioner but the same was received in the office of the respondent on 25/10/2001 in the evening at 5.05 p.m. Thereafter, on 27/10/2001 the petitioner once again wrote to the respondent. On 2/11/2001 the respondent sent a letter to the petitioner stating that assessment orders were passed on 23/10/2001 and as the second letter dated 23/10/2001 and letter dated 27/10/2001 were received by the respondent after completion of the assessment proceedings, the respondent was unable to take any cognizance of the contents of the said letters. On 7/11/2001 the Chartered Accountant of the petitioner once again wrote to the respondent. In the meantime it appears that the assessment order was served on the petitioner on 29/10/2001 wherein gross receipts to the

tune of Rs.16,74,229/- were taxed as total income holding that the petitioner was not entitled to exemption under Section 11 of the Act by virtue of Section 13(1)(c) of the Act.

ASSESSMENT YEARS 1991-92 & 1992-93.

8. The facts pertaining to these two assessment years are same as for assessment year 1990-91, except for the fact that for these two years the original assessments were framed under Section 143(3) of the Act. Moreover, in reassessment orders passed on 23/10/2001 the gross receipts to the tune of Rs.12,45,266/- and Rs.15,69,825/- respectively have been brought to tax.

ASSESSMENT YEAR 1993-94.

9. On 25/3/1998 notice under Section 148 of the Act was issued and assessment was framed on 8/3/2000 wherein the respondent himself granted exemption under Section 11 of the Act as held by the Tribunal for preceding years. It is this reassessment order which is reopened by impugned notice dated 9/1/2001 issued under Section 148 of the Act. In the fresh assessment framed on 23/10/2001 the respondent has taxed gross receipts of Rs.18,56,183/-.

ASSESSMENT YEAR 1994-95.

10. The return of income was filed by the petitioner on 27/7/1994 and the petitioner's claim for exemption under Section 11 of the Act was accepted on 27/10/1994 under Section 143(1) of the Act. On 19/11/1998 notice under Section 148 of the Act was issued and return in response to the said notice was submitted on 28/12/1998. On 25/10/2000 the respondent issued notice under Section 143(2) of the Act and on 23/11/2000 the respondent dropped the proceeding initiated under Section 147 of the Act. Fresh notice under Section 148 was issued on 9/1/2001 and in the assessment framed in pursuance of the said notice gross receipts of Rs.20,29,255/- have been brought to tax on 23/10/2001.

ASSESSMENT YEAR 1995-96.

11. The petitioner submitted return of income on 10/7/1995. It is the say of the petitioner that the said return was accepted, but the petitioner has not been intimated about the same. However, on 19/11/1998 notice under Section 148 of the Act was issued and return was filed on 28/12/1998. Notice under Section 143(2) of the

Act was issued on 25/10/2000 and on 23/11/2000 the proceedings initiated under Section 147 of the Act were dropped. Fresh assessment in pursuance to impugned notice under Section 148 of the Act dated 9/1/2001 has brought to tax gross receipts of Rs.21,61,335/- on 23/10/2001.

12 In the backdrop of the aforesaid materials and the facts and circumstances of the case Mr.S.N.Soparkar and Mr.K.H.Kaji appearing on behalf of the petitioner submitted that :

[a] For the first three assessment years, viz. assessment years 1990-91, 1991-92 and 1992-93 there was no scope for initiating proceedings under Section 147 of the Act because all that the respondent was required to do was to give effect to the order of the Tribunal which was passed for the said three assessment years,

[b] That for the fourth year viz. assessment year 1993-94 the respondent himself having followed the order of the Tribunal while framing assessment originally on 8/3/2000 it was not open to the respondent to issue notice under Section 148 of the Act for the second time, as the original assessment had been framed in pursuance of the notice dated 25/3/1998 and that too after the order of the Tribunal. It was not open to the respondent to contend that he was not aware of the direction given in para 31 of the Tribunal's order.

[c] In so far as the 5th & 6th years are concerned, viz. assessment years 1994-95 and 1995-96, it was contended that the respondent originally accepted the claim of the petitioner, issued notice under Section 148 of the Act on 19/11/1998 for both the years, dropped that initiation under Section 147 of the Act on 23/11/2000 i.e. after the date of the Tribunal's order and after considering the assessee's submission in pursuance to the notice issued under Section 143(2) of the Act and hence the respondent should

not be permitted to initiate fresh proceedings under Section 147 of the Act as there was no change in either facts or circumstances of the case.

13 It was further contended on behalf of the petitioner that the impugned notices issued under Section 148 of the Act were solely with the intention of withholding large amount of refund that had become due to the petitioner as a consequence of the order of the Tribunal and hence the entire action was malafide and should be struck down as such. In support of this contention the sequence of events and proceedings was pointed out to show undue haste in which the assessment had been framed and to the questionnaire letter issued by respondent to show that the requirements under the said letter were nothing but repetition of details which were already available with the respondent. In support of the contention that the action of the respondent was tainted with malafide and assessment had been framed in undue haste the attention of the Court was also invited to the fact that entire gross receipt had been taxed which was against the settled legal position. This Court had specifically laid down in case of C.I.T. vs. Ganga Charity Trust Fund, 162 ITR 612, and in case of C.I.T. vs. Shri Plot Swetamber Murti Pujak Jain Mandal, 211 ITR 293, that even in case of charitable trust the assessment has to be framed on the basis of the net income, which had to be worked out on a commercial basis.

14. As against this, Shri Mihir Joshi, learned Standing Counsel appearing on behalf of the Revenue submitted that these petitions should not be entertained and required to be dismissed summarily at the threshold because :

[i] The petitions were barred by delay and latches.

[ii] At least there was acquiescence on behalf of the petitioner : the petitioner having submitted returns of income on 20/7/2001 and responded to the notice issued under Section 142(1)/143(2) of the Act.

[iii] As could be seen from the various letters exchanged, the petitioner had been given adequate opportunities and there was no haste in framing assessment.

[iv] That the petitioner had already preferred appeals against fresh assessment framed on 23/10/2001 and hence should be relegated to the alternative statutory remedy.

[v] That the respondent had recorded reasons and from the said reasons it could be gauged that they were in accordance with requirement of Section 147 of the Act read with Proviso to the said Section as well as Explanation 1 and Explanation 2(c)(iii) of the Act.

[vi] That the Tribunal's order was relevant only for the first three assessment years and not for the later three years, and hence the notices issued under Section 148 of the Act were not to give effect to the Tribunal's order but were independent of the same.

[vii] That the assessment order could not be treated as being bad in law or nullity on the ground of undue haste and only remedy that the petitioner now had, was by way of appeal and the petitioner had already availed of the said remedy.

15 In rejoinder, it was submitted that there was no delay or latches as contended by the respondent, as the petitioner had been supplied with the reasons recorded only in August,2001 and immediately the petitioner had filed the petitions within reasonable period thereafter. In so far as acquiescence was concerned reliance was placed on decision of this Court in case of P.V.Doshi vs. C.I.T., 113 ITR 22 to submit that if the respondent did not have jurisdiction no consent could clothe him with such jurisdiction. It was further submitted that from the facts on record it was apparent that there was no failure on the part of the petitioner, and even assuming some failure or omission could be ascribed to the petitioner, the respondent was also liable for the escapement of income, if any, due to error on his part and the settled legal position as per decision of the Supreme Court in the case of Parshuram Pottery Works Ltd. vs. Income Tax Officer, 106 ITR 1, was that in such circumstances action under Section 147(a) of the Act (as the provision then stood) was not permissible. To meet the contention of the respondent regarding availing of alternative remedy, reliance was placed on decision of

the Apex Court in case of Calcutta Discount Co.Ltd. vs. Income Tax Officer, 41 ITR 191. It was submitted that in cases where the statutory remedy like appeal would result in long drawn out proceedings resulting in harassment of assessee it was incumbent upon the High Court to intervene. It was further pointed out that there was no distinction between first three assessment years and later three assessment years as the distinction sought to be drawn on behalf of the respondent, but as could be seen from the facts the reasons recorded were common, based on the findings of the Tribunal and further more, for the 4th, 5th, & 6th.years the petitioner's case was on a better footing as the respondent had already taken into consideration the Tribunal's order in the original proceedings.

16 It is well settled that any challenge to initiation of reassessment proceedings has to be tested primarily on the basis of the reasons recorded. The case of revenue must succeed or fail on the basis of reasons recorded. In the present case in para 4 of the reasons recorded, it is stated thus :

"4. The founder members and also other members falling in the list of persons u/s.13(3) (a) [list placed on record] of the act have contributed to the institution by a sum exceeding Rs.25,000/- upto the relevant previous year. Section 13 as amended by the Finance Act 1970-71 w.e.f. 01-04-1971 has excluded the benefit of Section 11 in case adversely effected by the provisions of Section 13(1)(c) of the IT act, if the benefit directly enures to the prohibited persons u/s.13(3) as per sub-clause (1) of clause (c) of sub-section (1) of Section 13, the provision of Section-11 or Section 12 would not operate to exclude such income of the previous year if it directly or indirectly enures for the benefits of prohibited persons listed in sub.sec.3 of Sec.13 in the following conditions prescribed in 13(1)(c) of the Act.

[i] if such trust or institution has been created or established after the commencement of this Act and under the terms of the trust of the rules governing the institution, any part of such income

enures, or

[ii] if any part of such income or any property of the trust or the institution (Whenever created or established) is during the previous year used or applied".

Thereafter, in the same para extract from the decision in case of C.I.T. vs. Ratan Trust, 227 I.T.R.356 has been reproduced. In para 5, it is stated thus :

"5 Whereas the assessee - trust despite being charitable institution as per order of the ITAT at the instance of the assessee itself is not eligible to exemption by virtue of provisions of section 13(1)(c) of the I.T.Act so as to exclude its income from total income of the previous year with reference to provisions of section 11 or section 12 in view of the law having emerged from the order of the ITAT, the income liable to tax has escaped assessment. That apart there is also failure on the part of the trust in making full and true disclosure of such material facts relevant to such income eligible to tax with reference to section 11 read with section 13(1)(c) as evident from the return of income filed".

17. Therefore, the reasons recorded go to show that the respondent is of the view that exemption under Section 11 of the Act would not be available to the petitioner in view of provision of Section 13(1)(c)(i) read with Section 13(3) of the Act. But what is more pertinent is that in para 5, it is recorded by the respondent that the income liable to tax has escaped assessment in view of the law having emerged from the order of the ITAT. The respondent further goes on to state: that apart, there is also failure on the part of the trust in making full and true disclosure of such material facts relevant to such income eligible (exigible?) to tax with reference to Section 11 read with Section 13(1)(c) as evident from the returns of income filed. On a plain reading of the reasons recorded following facts emerge :

[a] List of prohibited category of persons was available on record with the Assessing Officer,

[b] Liability to tax with reference to

Section 11 read with Section 13(1)(c) of the Act is evident from the return of income filed as per his own say,

[c] Income has escaped assessment in view of the law having emerged from the order of the Tribunal.

18. Having regard to the fact that the reasons recorded as extracted hereinbefore, themselves bring out contradiction in terms it cannot be stated that any failure or omission can be ascribed to the petitioner. Thus, it is not possible to state that there is any failure on part of the petitioner Trust in making full and true disclosure of all material facts necessary for the assessment of the assessment year in question.

19 Even otherwise, provisions of Section 13 open with a non obstante clause and hence by virtue of the said provisions exception to the exemption provided by Section 11 is carved out and an assessee is denied the exemption under Section 11 of the Act in case where the income or property of the Trust is used or applied or enures for the benefit of any person referred to in Section 13(3) of the Act. In the present case, it is the respondent who avers applicability of provision of Section 13(1)(c) and hence the onus is on him to establish the failure, if any. From the reasons recorded it is apparent that he is of the opinion that the Tribunal has specifically directed the respondent to initiate action as there is failure of the prescribed condition or that some portion of the property or income of the petitioner Trust enures for the benefit of the prohibited category of persons or some portion of the property or income is applied or used for the benefit of the prohibited category of persons specified in Section 13(3) of the Act. The law is well settled, a person who makes a positive averment is required to establish the same. It is not for the person against whom the averment is made to establish negatively that the state of affairs averred by the other person do not exist. Furthermore, the Tribunal nowhere states that provisions of Section 13 of the Act are applicable. All that is stated is to grant exemption u/s.11 of the Act subject to other conditions being fulfilled.

20. Even otherwise, as stated, provision of Section 13 carves out an exception to the applicability of provision of Section 11 of the Act, and hence, the exception has to be stated and established by the person who seeks to invoke and apply the exception. The

petitioner in the present case has prima facie established as can be seen from the order of the Tribunal, apart from the fact that the petitioner has also been granted exemption for assessment years 1984-85 to 1987-88 (and the same is not disturbed), that it is entitled to exemption under Section 11 of the Act and hence it will be the respondent who will have to establish that the petitioner is not so entitled. The impugned notice having been issued after expiry of the period of four years from the end of the relevant assessment year, the respondent shall have to establish that there was any omission or violation on the part of the petitioner to place all material facts necessary for the assessment of the assessment year in question. An omission or failure presumes a statutory obligation. From the reasons recorded itself it is apparent that the list of persons falling within the prohibited category as stipulated in Section 13(3) of the Act was already available on record. Thereafter, what inference in facts or in law had to be drawn was the duty of the respondent and in case the respondent failed on the said count such failure or omission cannot be laid at the doorstep of the petitioner. In this context reliance placed by Mr.Joshi on the provision of Explanation 1 to the effect that even if the list was available it would not amount to disclosure within the meaning of Proviso merely because the Assessing Officer could have with due diligence discovered material evidence is to be stated to be rejected. This is not a case where a significant, material or relevant evidence was hidden in mass of papers submitted along with the return of income. The entire scheme of assessment of charitable institution is laid down in Sections 11, 12 and 13 and the provisions operate as an integrated code and the respondent cannot be heard to state that he had not applied his mind to the applicability or otherwise of provision of Section 13 of the Act especially when he had initially declined to grant exemption under Section 11 of the Act. At the same time, it is extremely significant that for the 4th. year i.e. assessment year 1993-94, the Assessing Officer granted exemption in light of the order of the Tribunal inspite of the fact that in para 31 of its order (reproduced hereinbefore) the Tribunal had very categorically referred to provision of Section 13 of the Act. Similarly for the 5th and 6th years i.e. assessment years 1994-95 and 1995-96 the respondent had issued notice under Section 148 of the Act for both the years and processed the returns by issuance of notice under Section 143(2) of the Act for both the years and these notices were issued after order of the Tribunal, and then on consideration of the entire data of evidence

available before him dropped the proceedings.

21 Mr.Joshi also referred to Explanation 2(c)(iii) under Section 147 of the Act and contended that there was escapement of income by virtue of excessive relief having been granted to the petitioner and on the basis of such escapement the respondent was within his right to initiate the proceedings to reassess such escaped income. At the time of hearing, a pointed query was put to him as to whether the said Explanation viz. Explanation 2 has to be read subject to Proviso to Section 147 of the Act or dehors the same and he fairly submitted that the said Explanation i.e. Explanation 2 shall have to be read subject to Proviso under Section 147 of the Act. Thus, once again the controversy boils down to the fact as to whether there was any omission or failure on part of the assessee.

22. In so far as the contention regarding delay and latches is concerned it is apparent that the petitioner waited for the reasons recorded and on receipt of the same decided that on basis of such reasons the proceedings were without jurisdiction and hence challenged the same. Mr.Joshi contended that it was not necessary for the petitioner to wait till reasons were supplied to the petitioner but the petitioner could have challenged the impugned notice immediately on the service of the said notice without waiting for the reasons recorded. The petitioner could have done so. However, if the petitioner chose to wait for being supplied the reasons recorded it cannot be stated that such action on part of the petitioner deprived the petitioner of remedy available to it under the Constitution. In a case where on the receipt of the reasons recorded the assessee feels that it would be better to submit to the jurisdiction of the Assessing Officer, no prejudice would be caused to the revenue. However, where reasons are demanded it would be better if they are supplied so as to enable the petitioner to make up its mind as to whether such reasons are germane to the belief as to escapement of income or otherwise. It has to be borne in mind that recording of reasons under Section 148(2) of the Act, is a mandatory condition precedent and notice issued under Section 148 of the Act is a serious proceeding resulting in dislodgment of earlier assessment and no person should be compelled to face another innings of assessment without disclosure of reasons. When the initiation of reassessment proceeding is based on recording of reasons then it becomes all the more obligatory on the part of the authority concerned to disclose and communicate reasons, for appreciation and proper defence at least on

demand after submission of the return in compliance with the notice. At that stage, refusal is unwarranted in law and citation of absence of provisions in the Act tantamounts to closure of the eyes to realities. Law in fact permits no privilege in that behalf. The assessee is entitled to contest the issue effectively. This is possible only on obtaining the reasons. It cannot be gainsaid that the satisfaction of the conditions, being a sine qua non, can be judged only on the basis of the reasons. Refusal is thus arbitrary and prejudicial.Thus, the contention regarding delay and latches fails.

23. In so far as acquiescence is concerned this Court in case of P.V.Doshi vs. C.I.T.113 ITR 22, has specifically laid down that it is not possible for the assessee to waive fulfillment of mandatory condition precedent and if they do not exist the Assessing Officer cannot assume jurisdiction and any consent by way of participation in proceeding cannot confer jurisdiction on the authority where none exists.

24 The submission on behalf of the respondent that as the assessment framed had been challenged by way of appeal this Court should not intervene is answered by the following classic passage from the judgment of the Apex Court in case of Calcutta Discount Company Ltd. vs. Income Tax Officer

> "That though the writ of prohibition or certiorari would not issue against an executive authority, the High Courts had power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjected, or was likely to subject, a person to lengthy proceedings and unnecessary harassment, the High Courts would issue appropriate orders or directions to prevent such consequences. The existence of such alternative remedies as appeals and reference to the High Court was not, however, always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action. When the Constitution conferred on the High Courts the power to give

relief it became the duty of the Courts to give such relief in fit cases and the courts would be failing to perform their duty if relief were refused without adequate reasons."

25 Before parting we may observe that during course of hearing we had called for the original files of the respondent in view of the fact that submissions were made on behalf of the petitioner to the effect that the assessment had in fact not been framed on 23/10/2001 but subsequently and an attempt had been made by the respondent to over reach the process of the Court, that though the respondent had been served with process of the Court on 23/10/2001 in the later half of the day he had chosen to remain silent about passing of the assessment order on the said day. However, we feel that it is not necessary for deciding the present controversy to enter into the larger question as to what would be the effect of perusal of original files of the authority as contended by Mr.Joshi. Needless to state that, it is always open to the Court to undertake such an exercise and in a given case strike down or uphold the proceedings which have been challenged on the basis of such perusal of the original records. Once the petitioner has prayed for a writ of certiorari in the petition, the respondent cannot be heard to state that the respondent must be given an opportunity to meet with the case which developes on perusal of the original records. Such a request on behalf of the respondent can be considered provided it becomes necessary to fasten any liability personally on a particular authority. In view of what is stated it is not necessary for us to elaborately deal with the contention raised by both the sides on this aspect of the matter. Suffice it to state that the Court is not happy with the manner in which the reassessment proceedings have been conducted. In this context, the approach prescribed by the Apex Court in case of C.I.T. vs. Simon Carves Ltd., 105 I.T.R.212, may be usefully reproduced :

"The taxing authorities exercise quasi-judicial powers and in doing so they must act in a fair and not a partisan manner. Although it is part of their duty to ensure that no tax which is legitimately due from an assessee should remain unrecovered, they must also at the same time not act in a manner as might indicate that scales are weighted against the assessee. We are wholly unable to subscribe to the view that unless those

authorities exercise the power in a manner most beneficial to the revenue and consequently most adverse to the assessee, they should be deemed not to have exercised it in a proper and judicious manner".

26 We have considered various judicial authorities cited before us by both the sides, even if some of them might not have been specifically referred to and discussed in the judgment.

27. The petitions are allowed accordingly. The impugned notices dated 9/1/2001 issued under Section 148 of the Act in all the assessment years are quashed and set aside. As a consequence all the subsequent proceedings and the assessment orders dated 23/10/2001 passed by the respondent are quashed and set aside and the respondent is directed to refund the taxes collected by him in pursuance of such assessment orders. There shall be no order as to costs.

Sd/-
(B.C.Patel,J)

Sd/-
(D.A.Mehta,J)

m.m.bhatt